No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

EDWARD LABATON*
BERNARD PERSKY
MOJDEH L. KHAGHAN
GOODKIND LABATON
RUDOFF & SUCHAROW
100 Park Avenue
New York, NY 10017
(212) 907-0700

* *Counsel of Record*

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
SHARON R. VINICK
STACEY E. SEICSHNAYDRE
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Washington, D.C. 20005
(202) 662-8600

Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICUS CURIAE* 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 5
ARGUMENT 6
THE LOWER COURT ERRONEOUSLY APPLIED *SHUTTS* TO A RULE 23(b)(2) CLASS ACTION 6
A. Introduction 6
B. Civil Rights Class Actions And Established Practice Under Rule 23(b)(2) 7
C. Established Rule 23(b)(2) Procedures Fully Protect The Due Process Rights Of Absent Class Members 10
D. Practical Considerations In Assessing The Notice Requirements In Rule 23(b)(2) Class Actions 14
E. Policy Considerations Supporting Mandatory Classes 16
CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) ... 8, 9

Arizona v. Chicago Title Insurance Co., 485 U.S. 909 (1988) ... 3

Avagliano v. Sumitomo Shoji America, Inc., 107 F.R.D. 748 (S.D.N.Y. 1985) ... 7 n.4

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977) ... 12

Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992) ... 4, 6

Carson v. American Brands, 450 U.S. 79 (1981) ... 19

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) ... 12, 13

Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986) ... 15 n.7

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) ... 18

Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981) ... 10

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) ... 10

Greenfield v. Villager Indus., 483 F.2d 824 (3d Cir. 1973) ... 13

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) ... 13

Hansberry v. Lee, 311 U.S. 32 (1940) ... 13

Hartford Life Insurance Co. v. Ibs, 237 U.S. 662 (1915) ... 17

In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988) ... 2, 3

In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) ... 4 n.3

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ... 15

Kincade v. General Tire and Rubber Co., 635 F.2d 501 (5th Cir. 1981) ... 16

Kyriazi v. Western Electric Co., 647 F.2d 388 (3d Cir. 1981) ... 13

Larionoff v. United States, 365 F. Supp. 140 (D.D.C. 1973), *aff'd and remanded on other grounds*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977) ... 12, 17

Lloyd v. City of Philadelphia, 121 F.R.D. 246 (E.D. Pa. 1988) ... 11

Luevano v. Campbell, 93 F.R.D. 68 (D.D.C. 1981) ... 19

Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981) ... 10, 12

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) ... 8

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ... *passim*

Probe v. State Teachers' Retirement Sys., 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986) ... 9, 11

Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977) ... 10, 16

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) ... 9

Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) ... 8

Sosna v. Iowa, 419 U.S. 393 (1975) ... 10

Taylor v. White, 132 F.R.D. 636 (E.D. Pa. 1990) 11

United States v. Allegheny Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975) 10

STATUTES

Fed. R. Civ. P. 23(b)(1) ..... *passim*

Fed. R. Civ. P. 23(b)(2) ..... *passim*

Fed. R. Civ. P. 23(b)(3) 10, 12 17, 20

Fed. R. Civ. P. 23(c)(2) 17, 20

Fed. R. Civ. P. 23(d)(2) 12, 15

Fed. R. Civ. P. 23(e) 13, 15

Fed. R. Civ. P. 42(b) 14

Title VII, 42 U.S.C. §§ 2000e to 2000e-17 ..... 8, 15 n.7, 19

MISCELLANEOUS

1966 Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 73 (1966) 7-9, 12 n.6, 17 n.8

A. Miller & D. Crump, *Jurisdiction and Choice of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) 16-17

Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868 (1979) 8

7A C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* § 1776 (2d ed. 1986) 8

7B C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* §§ 1785, 1786 (2d ed. 1986) ... 11-12

Manual For Complex Litigation (1985) (Supplement to C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* (1969 - 1986)) 14-15

5 H. Newberg & A. Conte, *Newberg on Class Actions* § 24.106 (3d ed. 1993) 18

INTEREST OF THE *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to African Americans who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local affiliates have represented the interests of African Americans, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services, school desegregation, and housing discrimination. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

Throughout its thirty-year history, the Lawyers' Committee has filed class action cases designed to remedy systemic discrimination. Many of these cases have been certified as class actions pursuant to Federal Rule of Civil Procedure 23(b)(2). Since the Lawyers' Committee and its affiliates will continue to utilize class action litigation as a mechanism for remedying discrimination, the Lawyers' Committee has a strong interest in the adoption of legal principles that both safeguard the due process rights of individual class members and ensure that class actions can be used effectively in litigating claims that affect a large group of individuals.

The question presented in this case is whether due process requires that individual class members be given an opportunity to opt out of a suit brought under Fed. R. Civ. P. 23(b)(2) where there are class claims for monetary relief. The Ninth

---

[1] The parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk of the Court along with this brief, pursuant to Rule 37.3 of the Rules of the Court.

Circuit has held that the failure of a district court to permit class members to opt out amounts to a denial of due process and prevents any *res judicata* bar of those monetary claims. As the Lawyers' Committee will argue in this brief, due process does not require that class members be given an opportunity to opt out of class action litigation under Rule 23(b)(2) involving monetary claims.

STATEMENT OF THE CASE

In June 1986, a federal district court entered final judgment settling a series of class action lawsuits against six title insurance companies in which injunctive relief and damages were sought for alleged antitrust violations. *See In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) ("MDL 633"). Pursuant to the terms of the settlement, the defendant title insurers provided the plaintiff class, estimated at 3.4 million purchasers of title insurance, a package of benefits in exchange for the release of all federal and state price-fixing claims. The package included substantial injunctive relief and certain in-kind financial benefits; all damages claims were waived. Notice of the settlement was published on two occasions in each of thirty-six newspapers in the thirteen affected states, whose aggregate circulation equalled over 6¼ million.

In accepting the settlement, the district court certified the class under Rule 23(b)(1) and (b)(2). The court rejected objections to the settlement, including an attempt by the Arizona attorney general to opt out of the class. The court found that due process did not require that class members be notified of a right to opt out of the settlement or be permitted to opt out. Rather, the court found that the due process rights of absent class members were satisfied by the requirements

built into Rule 23, namely, that the class be adequately represented, notified of the proposed settlement, and that the court approve the settlement only if it was fair, adequate, and reasonable. *In re Real Estate*, 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,929. The State of Arizona, an objecting class member, appealed the MDL 633 final judgment. The Third Circuit affirmed, without opinion, the final judgment approving the settlement. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987). The State of Arizona filed a petition for *certiorari*, which was denied by this Court. *Arizona v. Chicago Title Insurance Co.*, 485 U.S. 909 (1988).

The present action was filed in the United States District Court for the District of Arizona as a collateral attack on the MDL 633 judgment. Two individual purchasers of title insurance in Arizona and Wisconsin filed an action on behalf of a class of purchasers from those states against the same title insurer defendants seeking injunctive and monetary relief for alleged federal antitrust violations. The defendants filed a motion for summary judgment on *res judicata* grounds; the district court granted the motion. Holding that the MDL 633 final judgment barred plaintiffs' claims, the district court rejected the plaintiffs' argument that under this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ("*Shutts*"), they were denied due process because they were not given notice and an opportunity to opt out of the MDL 633 litigation to pursue their individual monetary claims.[2] In *Shutts*, this Court held that due process required such opt out procedures in a state court action adjudicating claims "wholly or predominately

[2] The district court also rejected plaintiffs' assertion that they were inadequately represented in the prior action. The Ninth Circuit affirmed this finding, and that issue is not before this Court.

for money judgments." *See id.* at 811 n.3. The district court distinguished *Shutts*, finding that the equitable character of the relief in MDL 633 brought it outside the reach of *Shutts*, and that the other procedures used by the MDL 633 court satisfied due process.

The Ninth Circuit reversed, holding that the due process analysis in *Shutts* controlled the instant action. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992). The Court of Appeals found that because the MDL 633 litigation foreclosed "substantial damage claims,"[3] it fell within the *Shutts* rule governing claims wholly or predominantly for money judgments. *Id.* at 392. The lower court noted that in order to bind absent class members concerning their monetary claims, minimal due process required that they be provided with an opportunity to opt out of the litigation. *Id.* The court then held that because the plaintiffs were not given the opportunity to opt out of the MDL 633 litigation, *res judicata* could not bar their damages claims against defendants. *Id.* However, the lower court did hold that the settlement in MDL 633 barred the plaintiffs from seeking further injunctive relief. *Id.*

After the title insurers' petition for rehearing was denied in March 1993, they sought review, in this Court, of the Ninth Circuit's reversal of the district court's grant of summary judgment in their favor.

[3] The Ninth Circuit adopted this finding from a subsequent Third Circuit ruling that reversed an injunction against a state court collateral attack on the MDL 633 settlement. *See In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 761, 768 (3d Cir. 1989).

SUMMARY OF ARGUMENT

Contrary to the decision of the lower court, due process does not require that notice and an opportunity to opt out be provided to absent class members in a class action certified under Fed. R. Civ. P. 23(b)(2) seeking substantial equitable and monetary relief. The extensive protections built into Rule 23 are sufficient to protect the due process rights of members of mandatory classes. A decision holding that class members have a constitutional right to notice and opt out of a properly certified Rule 23(b)(2) class would greatly and unnecessarily burden the use of (b)(2) proceedings as a viable means of litigating civil rights actions.

Such a decision would reduce the likelihood of settlements in civil rights class actions under Rule 23(b)(2) since defendants would be often unwilling to settle cases if there exists a threat of subsequent litigation by class members who have opted out. It would also make such actions prohibitively expensive and would impede the ability of class plaintiffs to secure the broad, class-wide relief widely used to combat unlawful discrimination. Finally, it would lead to collateral attacks on judgments in Rule 23(b)(2) cases entered after contested proceedings as well as court-approved settlements. Accordingly, to extend the due process holding of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) to classes seeking substantial equitable and monetary relief and properly certified under Rule 23(b)(2) is unwarranted both as a matter of constitutional law and sound public policy.

ARGUMENT

THE LOWER COURT ERRONEOUSLY APPLIED *SHUTTS* TO A RULE 23(b)(2) CLASS ACTION

A. Introduction

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ("*Shutts*"), this Court painstakingly noted that its holding, involving the minimum due process required to bind an absent class member concerning a claim for money damages or similar relief at law,

> is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.

472 U.S. at 811 n.3. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), the lower court, without any analysis, applied the *Shutts* notice requirements, including the right to opt out, to a case which had been certified as a mandatory, non-opt out class under Rule 23(b)(2). In so doing, the court below was in error.

The sole reason given by the lower court for holding *Shutts* applicable was the assertion that the litigation was a "hybrid suit" which involved "substantial damage claims" and that an absent class member's monetary claims could not be foreclosed by the judgment in that case because the class member had not been afforded the right to opt out. Viewed most narrowly, the decision is erroneous because there was no holding or determination, as required by *Shutts*, that the claims asserted by the class were "wholly or predominately for money judgments."

As made clear in the notes of the Advisory Committee, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 1966 Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 73, 102. Thus, in certifying and maintaining the class under Rule 23(b)(2), the lower courts implicitly made and approved a finding inconsistent with the finding required by *Shutts*, *i.e.*, that the relief sought by the class did not relate exclusively or predominantly to money damages. The propriety of that certification has not been challenged before this Court, and this implicit but necessary finding should therefore be accepted by this Court.[4]

If, however, the lower court's holding is viewed more broadly, and the decision is read to require opt out notice to class members in all class actions involving claims for equitable and monetary relief properly certified under Rule 23(b)(2) (the issue that was expressly reserved in *Shutts*), the decision below is not only erroneous, but would also seriously affect class action litigation nationwide, especially civil rights litigation, and upset the finality of numerous judgments entered after contested proceedings as well as settlements in Rule 23(b)(2) class actions.

B. Civil Rights Class Actions And Established Practice Under Rule 23(b)(2)

Subdivision (b)(2) was added to Rule 23 in 1966, in part to make it clear that civil rights suits for injunctive or declaratory

---

[4] There is no basis for believing that a Rule 23(b)(2) class which seeks "substantial money claims," along with substantial equitable relief, is necessarily seeking relief which is "wholly or predominately for money judgments." *Cf. Avagliano v. Sumitomo Shoji America, Inc.*, 107 F.R.D. 748, 750 (S.D.N.Y. 1985).

relief can be brought as class actions. Rule 23(b)(2) has proven to be highly effective in meeting the challenges posed by this type of litigation. This success stems from the fact that the class suit is a uniquely appropriate procedure in civil rights cases, which generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals. 7A C. Wright, A. Miller & M. K. Kane, *Federal Practice and Procedure* § 1776, at 495-96 (2d ed. 1986). Rule 23(b)(2) has been invoked in a wide range of civil rights contexts, including suits arising out of alleged race and sex discrimination in employment, in school and housing desegregation suits, and in actions challenging public welfare statutes or regulations as discriminatory. *Id.* (*See* illustrative civil rights cases collected therein.)

While the text of Rule 23(b)(2) appears primarily to be directed at class actions seeking final injunctive or declaratory relief, the subdivisions of Rule 23 are not mutually exclusive. For example, under Title VII, 42 U.S.C. §§ 2000e to 2000e-17, it has generally been held that individual back pay awards for absent class members can be sought in a Rule 23(b)(2) class action. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 256-57 (5th Cir. 1974); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408-25 (1975). *See generally* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868 (1979); *cf. Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) ("primary prayer was for injunctive relief and the additional request for back pay does not preclude certification as a 23(b)(2) class action").

One of the primary justifications for permitting claims for Title VII back pay awards under Rule 23(b)(2) arises from the Advisory Committee's statement that (b)(2) does not extend "to

cases in which the appropriate final relief relates exclusively or predominantly to money damages." 1966 Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. at 102. In this regard, courts have generally held that Title VII back pay awards are not in the nature of monetary damages, but rather constitute equitable pecuniary relief. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at 417 ("the court's discretion [to award back pay] is equitable in nature"); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) ("The back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination . . . . [B]ack pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2).")[5]

Thus, Rule 23(b)(2) class actions often involve either (a) class claims for both equitable injunctive and equitable monetary (*i.e.*, back pay) relief, or (b) claims for equitable or declaratory relief combined with claims for legal damages, but only where such "final relief . . . [does not relate] exclusively or predominantly to money damages." 1966 Advisory Committee Notes, 39 F.R.D. at 102; *see Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986) ((b)(2) class actions are not limited to equitable or declaratory relief, but may also include incidental damages claims). It is respectfully submitted that insofar as a class is properly certified under and meets the express require-

[5] As the 1966 Advisory Committee Notes indicate, "[s]ubdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential." 39 F.R.D. at 102.

ments of Rule 23(b)(2) (or (b)(1)), due process does not require absent class members to be afforded the right to opt out of such a dual purpose mandatory class.

C. Established Rule 23(b)(2) Procedures Fully Protect The Due Process Rights Of Absent Class Members

The courts have generally held that class members in Rule 23(b)(1) and Rule 23(b)(2) actions have no due process right to exclude themselves from such actions as is true in Rule 23(b)(3) actions. *See, e.g., Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981); *see also Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (due process does not require that unnamed class plaintiff be given right to opt out of Rule 23(b)(2) class action); *Robertson v. National Basketball Ass'n.*, 556 F.2d 682, 685-86 (2d Cir. 1977) (preclusion of right to opt out of a Rule 23(b)(1) settlement does not violate due process).

As previously noted, in *Shutts* this Court did not hold that the due process notice and opt out rights referred to in that case were applicable to (b)(1) or (b)(2) classes. This is consistent with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974), where this Court carefully laid aside the question of what notice, if any, might be necessary in favor of a (b)(1) or (b)(2) class's absent members. Indeed, in *Sosna v. Iowa*, 419 U.S. 393, 396 n.4 (1975), the Court indicated quite plainly that since the suit therein sought injunctive and declaratory relief, but not monetary relief, "the problems associated with a Rule 23(b)(3) class action, which were considered by the Court last term in [Eisen]" did not exist. *Id.*; *see also United States v. Allegheny Ludlum Indus., Inc.*, 517 F.2d 826, 875-79 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

The provisions of Rule 23 relating to 23(b)(2) classes provide more than adequate protections for the due process interests of absent class members. First, in considering the very question of certification, courts have the responsibility to determine that the class claims arise out of conduct which has affected all of the class members in a manner that makes class-wide relief appropriate. 7B C. Wright, A. Miller & M. K. Kane, *Federal Practice and Procedure* § 1785, at 103-04 (2d ed. 1986). This ensures that the members of the class share common, if not identical, claims against the defendant. *See, e.g., Taylor v. White*, 132 F.R.D. 636, 648-49 (E.D. Pa. 1990). Thus, it is unlikely that there will be special defenses or issues relating to individual members of a (b)(1) or (b)(2) class. Further, a judgment in the action will afford each member of the class appropriate relief. *See, e.g., Lloyd v. City of Philadelphia*, 121 F.R.D. 246, 251 (E.D. Pa. 1988).

Second, before a class is certified, the court also has the responsibility to ensure that the absent class members will be adequately represented by the named plaintiffs. This includes an examination of the adequacy of the named plaintiffs, an inquiry into any potential conflicts among the class members, and the adequacy of counsel acting on behalf of the class. *See, e.g., Probe v. State Teachers' Retirement Sys.*, 780 F.2d at 780-81. These protections further ensure the identity of interests among class members and that the claims of absent class members are being fully and effectively represented.

> Thus, in suits under subdivisions (b)(1) and (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the

> absent members and give them the functional equivalent of a day in court.

7B C. Wright, A. Miller & M. K. Kane, *Federal Practice and Procedure* § 1786, at 195 (2d ed. 1986); *see also Larionoff v. United States*, 533 F.2d 1167, 1186 n.44 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 867 (1977).

In addition to judicial determination of the adequacy of class representation in a non-opt out class, the class's interests are further protected by Rule 23's provision that the court may issue orders requiring "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members at any step in the action . . . ." Fed. R. Civ. P. 23(d)(2).[6] Depending upon the facts peculiar to the case, this provision of the Rule provides the court with ample flexibility to meet the due process interests of absent class members that may arise in any (b)(1) or (b)(2) class action. For example, under subdivision (d)(2) of Rule 23, the district court has discretionary power to require that, in appropriate circumstances, an opt out right and notice thereof be given, should the court determine that such a right is desirable to protect the interests of the absent class members. *Penson v. Terminal Transport Co.*, 634 F.2d at 994; *Bauman v. United States District Court*, 557 F.2d 650, 659-60 (9th Cir. 1977); *cf. County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990) (while under Rule 23(b)(1) and (b)(2) there is no absolute right to opt out, as there is under Rule 23(b)(3), courts have discretionary power to allow exclusion).

---

[6] As stated in the 1966 Advisory Committee notes, "[i]n the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." 39 F.R.D. at 106.

Where a (b)(2) or other type of class action is settled, Rule 23(e) requires that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Since the settlement will be binding on class members, the court has a fiduciary obligation to the class in evaluating the fairness, reasonableness and overall adequacy of the relief provided in the settlement. *See, e.g., Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Greenfield v. Villager Indus.*, 483 F.2d 824, 832 (3d Cir. 1973). Where a class settlement has been negotiated prior to certification of the class, the court will subject such a settlement to a higher degree of scrutiny than is usual in assessing a settlement's fairness. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d at 1295.

As long as the standards for adequacy of class representation laid down in *Hansberry v. Lee*, 311 U.S. 32 (1940), have been met, a judgment in a dual purpose class action properly certified under 23(b)(2) should bind absent class members, even without prior notice. Indeed,

> [i]f an unnotified plaintiff of the class could thus be bound by an adverse class action judgment [in a (b)(2) class action], it followed that due process did not require receipt of a pre-judgment opportunity to opt out.

Kyriazi v. Western Electric Co., 647 F.2d 388, 393 (3d Cir. 1981).

In light of Rule 23's extensive built-in judicial safeguards to prevent abuse or unfairness to absent class members, which have worked well since 1966, there is no reasonable basis for rewriting the Rule to provide, as did the lower court, that

absent class members in a Rule 23(b)(2) class action involving a claim for substantial monetary relief must be afforded the due process right to opt out of the class.

D. Practical Considerations In Assessing The Notice Requirements In Rule 23(b)(2) Class Actions

Over the years since 1966, courts have developed practical experience in fairly and effectively managing class actions under Rule 23(b)(2) involving both injunctive and equitable or incidental monetary claims. For example, the *Manual For Complex Litigation* (1985) (Supplement to C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* (1969-1986)) provides guidance for the conduct of employment discrimination class actions. It expressly notes that such cases are frequently brought as class actions under (b)(2) on the basis that the defendant "has acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." *Id.* at § 33.52, p. 322.

> Absent unusual circumstances, the trial of an employment discrimination class action should be conducted in separate stages under Fed. R. Civ. P. 42(b). At "stage I," the court determines whether the defendants have discriminated against the class. If class-wide discrimination is found, the court next considers the appropriateness of class-wide injunctive relief and then . . . resolves claims for back pay and other individual relief by the various class members. In this second stage, the claimants —who, by proof of their membership in the class, are presumed to have been subjected to the discrimination practiced against the class—

> are permitted to present their individual claims of injury . . . .

Id. at § 33.54, pp. 330-31. *Cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977). In extreme circumstances, the court may permit opt outs during stage II proceedings. This, however, should not be routinely done. "Class members are sometimes permitted at this point to opt out of further proceedings in the case to pursue back pay claims in separate actions; this practice however, may lead to a proliferation of individual cases and frustrate later efforts to settle the litigation." *Manual for Complex Litigation*, at 330, n.130.[7]

Thus, in a typical employment discrimination class action under Title VII involving both injunctive and back pay relief certified under Rule 23(b)(2), if there is a class-wide finding of liability during stage I of the proceedings, the absent class members, under Rule 23(d)(2), would normally be provided with notice and the opportunity to present their individual monetary claims for back pay so that they may participate in stage II. In this way, the class members' rights to individual monetary relief are both protected and vindicated. If, however, the (b)(2) class's monetary and injunctive claims are settled, the absent class members, under Rule 23(e), would be provided with appropriate notice of that settlement, but they would not have a due process right to be excluded from its binding effect.

---

[7] In *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986), the court held that absent class members must be afforded the right to opt out of a 23(b)(2) Title VII class action at Stage II (the monetary relief stage) of the proceeding. Because Rule 23(b)(2) procedures provide adequate due process protections and because such an absolute opt out right would tend to defeat settlement efforts, the Lawyers' Committee urges that the ability to opt out of a 23(b)(2) class action remain a matter of sound judicial discretion.

> The due process clause of the Constitution is satisfied when a Rule 23(b)(2) class action is settled without providing objectors a means of opting out because the objectors are (1) adequately represented by the named plaintiffs, (2) represented by an attorney who is qualified, (3) provided with notice of the proposed settlement, (4) given an opportunity to object to the settlement, and (5) assured that the settlement will not take effect unless the trial judge—after analyzing the facts and law of the case and considering all objections to the proposed settlement—determines it to be fair, adequate and reasonable.

Kincade v. General Tire and Rubber Co., 635 F.2d 501, 507-08 (5th Cir. 1981). *See also Robertson v. National Basketball Ass'n*, 556 F.2d at 685-86.

E. Policy Considerations Supporting Mandatory Classes

If the lower court's decision is read to require that an absent class member be afforded the right to opt out before being foreclosed from asserting a substantial claim for monetary relief, such affirmance would ban virtually all mandatory classes certified under Rule 23(b)(1) as well as most dual purpose classes under Rule 23(b)(2). However, mandatory (non-opt out) classes have long been judicially recognized and find historical precedent in the equitable bill of peace which developed as a procedure to prevent multiple suits concerning common questions, particularly those in which many people made claims to the same property or fund, by consolidating them in a single suit in equity. A. Miller & D. Crump, *Jurisdiction and Choice of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 40 (1986).

By definition, it is impossible to resolve separately individual claims involving common rights or limited funds, *see, e.g., Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), or group challenges to, for example, a statutory provision regarding military re-enlistment bonuses, *Larionoff v. United States*, 365 F. Supp. 140 (D.D.C. 1973), *aff'd and remanded on other grounds*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977). In each of these situations, as well as in most other Rule 23(b)(1) mandatory classes, a unitary decision is crucial and the right to opt out would defeat this purpose.

Similarly, the need for a unitary decision in a (b)(2) class action is equally compelling. Where the sole relief sought is equitable, such as a general injunction, it is self-evident that absent class members should not be afforded the right to opt out so that they may litigate their right to subject the defendant to different or inconsistent general injunctive obligations. The presence in a (b)(2) class action of claims for equitable monetary relief (back pay), incidental damages, or damages that are fixed or calculable according to some formula,[8] should not affect the right to notice or opt out under Rule 23(b)(2). Of course, should the relief sought relate wholly or predominantly to monetary damages at law, the action should be certified under Rule 23(b)(3) and not (b)(2), thus affording absent class members with notice and the right to opt out as provided in Rule 23(c)(2).

---

[8] Examples of monetary relief provided by the Advisory Committee in its 1966 Notes to Rule 23(b)(2) include damages which may be computed according to some uniform or fixed formula. 39 F.R.D. at 102.

If notice and the opportunity to opt out are required in every (b)(2) action involving monetary relief, many class actions would simply not be brought because of the prohibitive costs of providing such notice. Quite apart from shouldering the burden of providing notice to the entire class, plaintiffs and class members in civil rights cases, in particular, are already hard-pressed to find the resources to pursue their individual claims. As a result, civil rights enforcement would be greatly diminished and a substantial number of class members would be unable to pursue valid monetary claims. As this Court has observed,

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

In addition, a procedure requiring an opportunity to opt out may weaken the ability of class members to vindicate their rights. Class members' fear of retaliation by defendants—whether well-founded or not—would seriously undermine the use of the class action device to enforce effectively the civil rights laws and to carry out the intent of Congress. *Cf.* 5 H. Newburg & A. Conte, *Newburg on Class Actions* § 24.106, at 24-354 (3d ed. 1993) (empirical evidence demonstrates that fear of reprisals deterred victims of discrimination from participating in class actions).

Another policy consideration militating in favor of the mandatory nature of dual purpose classes under Rule 23(b)(2) is the strong public policy in favor of the settlement of claims.

This Court has held that this policy is particularly important in the resolution of cases brought under Title VII because of the "strong preference" of Congress for "encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands*, 450 U.S. 79, 88 n.14 (1981).

Decisions emphasizing the preferred role of settlements under Title VII are legion. *Luevano v. Campbell*, 93 F.R.D. 68, 85 (D.D.C. 1981) (*see also* cases cited therein). The court in *Luevano*, approving a consent decree in a class employment discrimination action challenging the use of an employment test, noted that all parties in the litigation had an interest "in eliminating any danger of conflicting remedial orders arising from the prosecution of other cases by class members . . . [which] is a reasonable and proper basis for the provisions of the Consent Decree binding all class members to the relief provided by the settlement." *Id.* at 93.

Such a vital interest would be ignored, and the parties' reasonable expectations and reliance on the provisions of duly entered class action judgments in dual purpose Rule 23(b)(2) class actions, especially civil rights actions, would be rendered useless if absent class members with claims for monetary relief were permitted to attack collaterally such duly entered judgments simply and solely because they were not afforded the right to opt out. Due process does not require such a result, nor does this Court's holding in *Shutts*. Because the lower court's decision on review here mandates impermissible collateral attacks on judgments duly entered in Rule 23(b)(2) (and (b)(1)) class actions, it should be reversed.

As a final matter, the Lawyers' Committee is aware of issues that may arise in civil rights class actions which not only contain injunctive and equitable monetary claims, but also class claims for damages at law under a variety of civil rights

statutes. Separable claims at law for general damages under these statutes should normally be certified under Rule 23(b)(3). The fact that such general damage claims are joined with equitable (b)(2) claims should not be used to deny class members their due process rights to notice and opt out afforded to Rule 23(b)(3) class members by Rule 23(c)(2).

In such circumstances, the Lawyers' Committee would urge that injunctive and equitable monetary claims should be certified under Rule 23(b)(2), while the class's legal claims, such as for mental and emotional distress, should be separately certified under Rule 23(b)(3). In this way, the mandatory nature as well as the benefits of a Rule 23(b)(2) injunctive and back pay class would be preserved, thus ensuring consistent and coherent equitable relief, while at the same time, the class would be afforded the opportunity to recover compensatory damages, consistent with the due process safeguards of Rule 23(b)(3).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

EDWARD LABATON*
BERNARD PERSKY
MOJDEH L. KHAGHAN
GOODKIND LABATON
RUDOFF & SUCHAROW
100 Park Avenue
New York, NY 10017
(212) 907-0700

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
SHARON R. VINICK
STACY E. SEICSHNAYDRE
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Washington, D.C. 20005
(202) 662-8600

* *Counsel of Record*

Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

November 15, 1993